

IN THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

TYRONE KEYS	:	
	:	
Plaintiff,	:	
v.	:	Case No. 8:18-cv-02098-CEH-JSS
	:	
BERT BELL/PETE ROZELLE	:	
NFL PLAYER RETIREMENT PLAN	:	
and the NFL PLAYER DISABILITY	:	
& NEUROCOGNITIVE BENEFIT	:	
PLAN	:	
	:	
Defendants.	:	
_____	:	

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANTS’  
MOTION TO VACATE SCHEDULING ORDER**

Plaintiff, Tyrone Keys (“Keys”), by and through his undersigned counsel and pursuant to Rule 3.01(b) of the Local Rules of the United States District Court for the Middle District of Florida, hereby files his Memorandum in Opposition to Defendants’ Motion to Vacate Scheduling Order (Doc. 30).

In their Motion to Vacate Scheduling Order, Defendants request that the Court vacate its Case Management and Scheduling Order (“Scheduling Order”) issued on November 7, 2018 (Doc. 20), and direct the parties to file an amended joint case management report, which should include **“new deadlines . . . necessary for discovery on Defendants’ counterclaim(s),** dispositive motions (currently due June 7, 2019), the preparation and filing of a joint pre-trial statement, the filing of pre-trial motions and briefs, and trial.” *See* Defendants’ Motion to Vacate, Doc. 30, at 2 (emphasis added). As elaborated upon in Keys’ Motion to Amend Case Management and Scheduling Order (Doc. 31), although Keys has no objection to an extension of

the deadlines in the Court's Scheduling Order **that have not yet expired**, beginning with the June 7, 2019, deadline for the filing of dispositive motions, Keys objects to Defendants' Motion to Vacate to the extent Defendants are attempting to use that motion as a vehicle to extend the discovery cut-off date without having established the requisite good cause.

The Court's Scheduling Order specifically provides that motions for an extension of the discovery cut-off date will not be granted "absent a showing of good cause." *See* Scheduling Order, Doc. 20, at p. 5. Keys does intend to file an amended complaint by the June 11, 2019 deadline set forth in the Court's Order on Defendants' Motion to Dismiss (Doc. 28). The fact that the pleadings will not have "closed" by the current dispositive motion deadline of June 7, 2019, however, does not constitute good cause for an extension of the discovery cut-off date, which expired on May 10, 2019.

Defendants' position that a new deadline should be established for discovery on Defendants' counterclaim(s) has no basis in fact or law. Importantly, the parties' Case Management Report (Doc. 18) states as follows:

**Defendants intend to countersue Plaintiff to obtain a judgment against him in the amount of disability benefits overpaid to him, plus interest. Defendants anticipate minimal discovery with respect to these counterclaims.** Plaintiff contends that the evidence for Defendants' countersuit is limited to the Administrative Record and no discovery should be permitted regarding the countersuit.

*See* Case Management Report, Doc. 18, at p. 9 (emphasis added).

Despite the fact that Defendants have fully understood the nature of their anticipated counterclaim against Keys since the inception of the case, as expressly acknowledged in the Case Management Report, and have admitted that such discovery would have been "minimal," Defendants have not served **any** discovery in the case or sought an extension of the discovery

deadline before its expiration. Equally troubling is that Defendants have never moved the Court for a stay of discovery. In that regard, the Court's Scheduling Order provides that a party seeking to extend the discovery deadline "**must show that the failure to complete discovery is not the result of lack of diligence in pursuing discovery.**" *See* Scheduling Order, Doc. 20, at p. 5 (emphasis added). Defendants can hardly meet that burden as they have served no discovery at all and now request that the Court establish a new unilateral deadline so they only can take discovery on their to-be-filed counterclaim.

The pendency of Defendants' motion to dismiss did not provide good cause for Defendants' failure to conduct discovery. Significantly, the motion to dismiss did not seek dismissal of Keys' entire Complaint. Irrespective of whether the motion was granted or denied (in whole or in part), Defendants have always been aware that their motion would not have disposed of the entire case. Thus, if any discovery was warranted, it was incumbent upon Defendants to move forward with discovery or seek an extension or stay of discovery prior to the expiration of the discovery deadline. In this regard, the Court's Scheduling Order makes no distinction between discovery on Keys' Complaint versus discovery on Defendants' counterclaim (as is typical of a scheduling order in any civil case). Indeed, if a defendant were permitted to allow the discovery cut-off date to expire without taking any discovery and then move the court to vacate its scheduling order so the defendant could take discovery anew on its counterclaim despite the expired deadline, no court could ever effectively manage its docket.

Finally, Keys would point out that Defendants are not asking for discovery to be opened entirely, but rather for a unilateral extension of discovery on matters pertaining solely to their to-be-filed counterclaim. As explained in Keys' Motion to Amend Case Management and Scheduling Order, because this is an ERISA benefits case, Keys believes that discovery should be

limited to the Administrative Record in any event. *See* Doc. 31 at p. 3, n.1. If the Court does reopen discovery, however, Keys believes the re-opened discovery period should be mutual and not unilateral.

In summary, while Keys has no objection to an extension of the dispositive motion deadline (currently June 7, 2019) and the related **unexpired** pretrial and trial deadlines since the pleadings are not yet closed, this Court should not permit Defendants to utilize an extension of the dispositive motion deadline as an excuse to take discovery anew when Defendants made no attempt to take discovery prior to the expiration of the discovery cut-off date (May 10, 2019).

/s/ Lansing C. Scriven  
LANSING C. SCRIVEN, ESQ.  
Florida Bar No. 729353  
LANSE SCRIVEN LAW  
lanse@lansescriven.com  
3903 Northdale Blvd., Suite 100e  
Tampa, FL 33624  
813/940-4000 (Telephone)  
813/327-4828 (Facsimile)

--and--

JEFFREY DAHL, ESQ.  
Texas State Bar No. 05310900  
LAW OFFICE OF JEFFREY E. DAHL  
405 N. St. Mary's Street, Suite 242  
San Antonio, Texas 78205  
210/527-0900 (Telephone)  
210/527-0901 (Facsimile)  
Attorneys for Plaintiff, Tyrone Keys

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO VACATE SCHEDULING ORDER** has been electronically filed with the Clerk of the Court using the CM/ECF system. I further certify that a true and correct copy of the foregoing will be furnished to counsel of record through the CM/ECF system on this **5th** day of June, 2019.

/s/ Lansing C. Scriven